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IN THE

Supreme Court of the United States

No. [redacted] -47 -61

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION

HORACE R. LAMB,
Attorney for Petitioner,
15 Broad Street,
New York, N. Y.

IN THE

Supreme Court of the United States

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Motion

To: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, St. Regis Paper Company, respectfully moves, pursuant to Section 10(d) of the Administrative Procedure Act*, for an order postponing the effective date of investigative orders issued by the Federal Trade Commission to petitioner and its former subsidiaries, pending final determination in this Court of petitioner's petition for a writ of certiorari, which is filed concurrently with the filing of this motion. The Commission's orders were the subject of judicial review in the United States District Court for the Southern District of New York (reported at 181 F. Supp. 862) and in the Court of Appeals for the Second Circuit, where judgment affirming the District Court in part and reversing the District Court in part was entered December 16, 1960 (not yet reported in the Federal Reporter, but reported in CCH Trade Regulation Reporter, Paragraph 69,880). The opinion of the Court of Appeals is appended to the petition for writ of certiorari. The opinion of the District Court is in the Record filed in this Court.

* 60 Stat. 243 (1946); 5 U. S. C. §1009(d) (1952).

1. Statement as to Application Previously Made

On December 28, 1960, petitioner moved in said Court of Appeals for an order (1) staying the mandate of that Court and (2) postponing the effective date of the said orders of the Federal Trade Commission which were the subject of judicial review as stated above. On January 10, 1961, the Court of Appeals granted petitioner's motion for the stay of its mandate in an opinion and decision signed by Circuit Judges Tuttle and Friendly, but which did not mention any action on petitioner's second request to postpone the effective date of the Commission's orders.

However, in a separate concurring opinion and decision signed by Chief Circuit Judge Lumbard, it was stated:

> "I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this Court is stayed."

The separate opinions and decisions of the Judges of the Court of Appeals dated January 10, 1961, are appended hereto.

2. Summary History of Case

As more fully shown in the copy of petitioner's petition for writ of certiorari filed in this Court, the instant action was commenced by the United States of America, as plaintiff, for (1) relief in the nature of mandamus, pursuant to Section 9 of the FTC Act,* requiring petitioner to answer in writing approximately 360 separate questions stated in the Commission's orders and (2) to recover forfeitures of $200 per day accumulating from the date of the declarations by the Commission of petitioner's default in answering such questions and continuing

*38 Stat. 722 (1914); 15 U. S. C. §49 (1952).

throughout the entire period of alleged noncompliance with the Commission's orders.

After answer denying liability under both counts of the complaint and asserting various affirmative defenses, including invalidity of the Commission's orders under Section 6(b) of the Administrative Procedure Act,* the action was tried in the District Court by Chief Judge Sylvester J. Ryan on stipulated facts.

The District Court held the Commission's order objectionable in large part and denied the claim for forfeitures, saying, among other things:**

> "Since, however, we hold that the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances."

Acting pursuant to Section 6(c) of the Administrative Procedure Act, the District Court ordered petitioner to answer approximately one-third of the questions contained in the Commission's orders and dismissed the claim for forfeitures. Petitioner complied with all of the provisions of the judgment of the District Court except the questions requiring copies of reports to trade associations and copies of census reports for the Census of Manufactures which were not due until 60 days after the judgment.

On the sixtieth day after the entry of the judgment of the District Court, the Government filed and served a notice of appeal, appealing from only the dismissal of the Government's claim for forfeitures. On receiving the Govern-

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*60 Stat. 240 (1946); 5 U. S. C. §1005(b) (1952).

**181 F. Supp. 862, 868, 869.

ment's notice of appeal petitioner cross-appealed from the portions of the judgment requiring it to answer the questions described above.

The Court of Appeals for the Second Circuit affirmed so much of the District Court's judgment as ordered petitioner to answer the questions designated in the judgment, but reversed the District Court's dismissal of the claim for forfeitures, holding petitioner liable for forfeitures, accumulating at the rate of $100 per day.

3. Reasons for Granting the Motion

Petitioner's motion for a postponement of the effective date of the orders of the Federal Trade Commission which were the subject of review below is made pursuant to the provisions of Section 10(d) of the Administrative Procedure Act. That section provides, in pertinent part, as follows:

> "• • • Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, *every reviewing court* (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." (Emphasis added.)

When petitioner moved in the Court of Appeals, it was argued by the Government that Section 10(d) may be invoked only when the adversely affected person has affirmatively instituted an action for judicial review of administrative agency action, and that it is not available where agency action is reviewed in defense of an action

brought for judicial enforcement of the action of the administrative agency.

Nothing in Section 10(d), or any other subsection of Section 10 of the Administrative Procedure Act, supports the construction which the Government urged. On the contrary, it is clear from Section 10(b) that the court which entertains an enforcement action brought by the Attorney General pursuant to Section 9 of the Federal Trade Commission Act is a "reviewing court" within the meaning of Section 10(d).

Section 10(b) provides, in pertinent part, as follows:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute * * * Agency action shall be subject to judicial review in civil or criminal *proceedings for judicial enforcement* except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." (Emphasis added.)

Whether the person "adversely affected" by agency action is the plaintiff or the defendant, the policy of Section 10(d) is the same, namely, to prevent the person to whom agency action is directed from being adversely affected by such action during the period of judicial review. See the Report of the Committee on the Judiciary which accompanied the bill,* reprinted in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2nd Sess. (1946) (hereinafter "Legislative History"), where it was said, at page 277:

> "The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency

* S. 7, 79th Cong., 1st Sess. (1945).

> action are to be construed to extend rights pending judicial review. * * *"

Having power to grant the relief requested on this motion, we urge that there are compelling reasons why this Court should exercise the power in this case. Unless the effective date of the agency action is postponed, and the $100 per day forfeitures for non-compliance therewith tolled, petitioner will be denied judicial review which meets the statutory standards of fairness, i.e., a review free of the coercive effect of the overhanging, mounting penalties. At the date of the filing of this motion, the accumulated penalties are estimated at the amount of $56,700.

It is also apparent from the legislative history that the statutory requirement that agency penalties be tolled in order to assure adequate judicial review is a restatement of the constitutional rule that agency action which is reviewable only at the risk of paying large forfeitures constitutes a denial of due process. The following is the "Explanation" of Section 10(d) in the Senate Judiciary Committee Print (Legislative History, page 38):

> "The first sentence merely confirms administrative authority to grant a stay. The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself. *Cotting* v. *Kansas City Stockyards*, 183 U. S. 79, 101-102; *Ex parte Young*, 209 U. S. 123, 145, 147, 163; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 662; *Chesapeake & Ohio Railway Co.* v. *Conley*, 230 U. S. 513, 521; *St. L. I. M. & So. Ry.* v. *Williams*, 251 U. S. 56, 63; *Oklahoma Operating Company* v. *Love*, 252

> U. S. 331, 337; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 395; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19."

Throughout this litigation, petitioner has relied on *Oklahoma Operating Company* v. *Love* and other cases cited by the Senate Committee as authority for its contention that it was being deprived of its property without due process of law, in view of this Court's decision, in *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), which held that petitioner had to await mandamus proceedings and risk paying substantial forfeitures in order to test the validity of the Commission's orders.

In the instant case, the Court of Appeals held that petitioner's constitutional objection was without merit because, in its view, *Claire Furnace* had been overruled by the subsequent enactment of the Declaratory Judgment Act* and the Administrative Procedure Act and that petitioner had a right to review under those Acts. The Court of Appeals further stated that:

> "* * * it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds. * * *"

The failure of a majority of the Court of Appeals to grant petitioner's motion to postpone the effective date of the Federal Trade Commission's orders, in our view, was clearly inconsistent with its statement that if petitioner had been subject to daily forfeitures during the period of judicial review, "* * * the procedure might not meet the established standards of due process. Cf. *Oklahoma Operating Co.* v. *Love*, *supra*. * * *"

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* 48 Stat. 955 (1934); 28 U. S. C. §2201.

The Court of Appeals rejected petitioner's constitutional argument because of the existence of Administrative Procedure Act remedies; logically it should have granted petitioner's subsequent request for relief under Section 10(d) of that Act.

The majority of the Court of Appeals having denied petitioner's motion in that Court, petitioner has exhausted the possibility of obtaining in the Court below the relief here requested.

As has been shown (*supra*, page 5) Section 10(d) of the Administrative Procedure Act is applicable to cases involving judicial review of administrative action whether the person "adversely affected thereby" is the plaintiff or the defendant.*

In the circumstances, and in view of the fact that the Chief Judge of the Court of Appeals below found merit in petitioner's motion for the relief here requested, it is respectfully submitted that this Court should exercise its powers under Section 10(d) of the Administrative Procedure Act and its inherent equity powers to postpone the effective date of the orders of the Federal Trade Commission, thus tolling the accumulation of possible for-

* Petitioner was defendant in this case because the Government's complaint was served during the course of correspondence and negotiations between petitioner's counsel and the general counsel for the Federal Trade Commission regarding the willingness of the Commission to submit to the jurisdiction of the District Court in an action for a declaratory judgment and other relief to be commenced by petitioner against the Commission (see Record filed with petition for writ of certiorari, pages 36 and 37). The Commission's general counsel advised petitioner's counsel that the Commission would be "constrained to object to the court's jurisdiction", citing *Federal Trade Commission* v. *Claire Furnace Co.*, *supra*. The instant action was commenced several days before a meeting between counsel was to take place.

feitures, pending the conclusion of judicial review in this Court.

Dated February 7, 1961

Respectfully submitted,

HORACE R. LAMB

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Horace R. Lamb,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—October Term, 1960

Docket No. 26413

UNITED STATES OF AMERICA,

Appellant,

v.

ST. REGIS PAPER CO.,

Appellee.

Before LUMBARD, Chief Judge, TUTTLE and FRIENDLY, Circuit Judges.

The mandate is stayed for a period of 30 days pending application to the Supreme Court of the United States for a writ of certiorari, and subject thereafter to the provisions of Rule 28(c)(2) of this court; and provided further that should the Supreme Court limit any grant of certiorari to less than all of the issues presented, then the stay of mandate shall automatically dissolve with respect to the issues on which certiorari is not granted.

/s/ ELBERT P. TUTTLE
(per HJF)

/s/ HENRY J. FRIENDLY

10 January 1961

I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed.

/s/ EDWARD J. LUMBARD